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No. 84-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM C. LAMPTON,

Petitioner,

v.

DON BOSSE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a remark by the prosecutor during the opening statement at petitioner's state court trial denied petitioner due process of law.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit which affirmed the denial of a writ of habeas corpus by the United States District Court for the Central District of Illinois was an unpublished order dated May 30, 1984. The order has been submitted to this Court as an appendix to the Petition for Writ of Certiorari, and, therefore, is not contained in the Brief in Opposition.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked pur suant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, William C. Lampton, was indicted by the Tazewell County, Illinois, grand jury for attempt murder, two counts of armed violence, and four counts of aggravated battery. Following a jury trial, petitioner was found guilty of two counts of armed violence and four counts of aggravated battery. Petitioner was found not guilty of attempt murder. A judgment of conviction was entered on the findings.

From a judgment of conviction, petitioner took a direct appeal to the Illinois Appellate Court, Third District. On appeal petitioner argued, *inter alia*, that the prosecutor's opening statement denied him a fair trial. The appellate court rejected petitioner's arguments and affirmed the conviction. *People v. Lampton*, 108 Ill. App. 3d 41, 438 N.E.2d 915 (3d Dist. 1982).

Having taken a direct appeal, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Central District of Illinois pursuant to 28 U.S.C. § 2254. Petitioner raised a single ground in support of habeas corpus relief: Whether the prosecutor's remarks made during his opening statement denied peti-

tioner a fair trial. The district court denied petitioner habeas corpus relief based on this claim.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Seventh Circuit. The court affirmed the denial of the petition for writ of habeas corpus in an unpublished order. From this judgment of the Seventh Circuit, petitioner brings the instant petition for a writ of certiorari.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit insofar as the question presented for review involves an application of *Frazier v. Cupp*, 394 U.S. 731 (1969), to the facts of the case. In seeking a writ of certiorari petitioner advances a single question for review. However, the question presented involves application of well-defined decisional law of this Court and federal courts of appeals to the facts of the case. Respondent maintains further review of this cause is unnecessary because the decision below does not depart from established federal precedent. The court fully considered and correctly decided the issue. Respondent further maintains it would not be prudent for this Court to grant certiorari on an issue of such limited importance.

A REMARK BY THE PROSECUTOR DURING THE OPENING STATEMENT AT PETITIONER'S STATE COURT TRIAL DID NOT DENY PETITIONER DUE PROCESS OF LAW.

Petitioner contends he was denied a fair trial when the prosecutor in his opening statement stated to the jury that a witness would testify that he saw a man matching the description of the petitioner walking away from the victim and the prosecutor did not call the witness at trial. (Petition at 14) Respondent maintains that the single statement of the prosecutor was not so prejudicial as to deny petitioner a fair trial.

This Court in *Frazier v. Cupp*, 394 U.S. 731, 736 (1969) articulated the approach to be taken by reviewing courts when a challenge is raised with respect to a prosecutor's statement:

> It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly, not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given.

Thus, when a claim is advanced by way of a habeas corpus petition of the prosecutor's comments at trial, the Seventh Circuit's standard of review was the narrow standard of due process, not the broad exercise of supervisory power that federal courts of appeals possess in regard to their own trial courts. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1973). As articulated by the

Seventh Circuit, in order for a habeas corpus petitioner to prevail on a claim of prosecutorial misconduct with respect to his opening statement, the alleged error must be one of constitutional magnitude. The remarks of the prosecutor must be so prejudicial that they render the trial fundamentally unfair. *United States ex rel. Garcia v. Lane*, 698 F.2d 900 (7th Cir. 1983).

Respondent maintains that under the circumstances of the case the prosecutor's statement regarding possible testimony of a witness did not prejudice petitioner so as to deny him a fair trial. Petitioner failed to demonstrate that the prosecutor engaged in either persistent and pronounced misconduct or that the evidence presented by the State was so insubstantial that but for the remark no conviction would have resulted.

Moreover, any prejudicial effect was neutralized by the trial court's instruction to the jury to disregard any opening remark not based on evidence subsequently presented at trial. The Seventh Circuit fully considered and correctly decided the claim advanced by petitioner. The decision of the court follows established precedent where the court, relying on *Frazier v. Cupp*, 394 U.S. 731 (1969), held:

> Everything was done by the prosecutor and trial judge that could as a practical matter be done to cure the problem. The judge's instruction alone was sufficient in the circumstances of this case. It is not uncommon for things to change after opening statements during the course of the trial. Those changes do not necessarily constitute prejudice of constitutional magnitude. The circumstances in this case do not render the trial fundamentally unfair.

(Appendix at 10)

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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